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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 190

FRANK CARMINE NARDONE, AUSTIN L. CALLAHAN, HUGH BROWN, AND ROBERT GOTTFRIED, PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 327–332) is reported in 90 F. (2d) 630. The District Court for the Southern District of New York rendered no opinion.

JURISDICTION

The judgment sought to be reviewed was entered June 21, 1937 (R. 332). The petition for a writ of certiorari was filed July 3, 1937 and granted October 11, 1937. The jurisdiction of this Court

is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court on May 7, 1934.

QUESTION PRESENTED

The sole question presented is whether evidence procured by tapping telephone wires and intercepting telephone messages is inadmissible in a Federal prosecution in view of Section 605 of the Federal Communications Act of 1934.

STATUTES INVOLVED

Section 605 of the Federal Communications Act of June 19, 1934, c. 652, 48 Stat. 1064, 1103; U. S. C., Title 47, Sec. 605:

> No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may

be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided,* That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.

Section 501 (the penal section of the Federal Communications Act) c. 652, 48 Stat. 1064, 1100; U. S. C., Title 47, Sec. 501:

> Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided herein, by a fine of not more than $10,000 or by imprisonment for a term of not more than two years, or both.

STATEMENT

On May 15, 1936, an indictment in three counts was returned against the petitioners in the Southern District of New York growing out of the smuggling of a large quantity of alcohol. (R. 2–7.) Each of the petitioners was convicted upon all of the counts. (R. 289.) Petitioner Nardone was sentenced to three years' imprisonment and the other petitioners to a year and a day. (R. 291.)

The petitioners allege that the trial court committed reversible error in permitting the introduction in evidence over their objection of a number of telephone conversations between the petitioners and others which Federal agents had intercepted by means of tapped wires. (Pet. p. 2). The Cir-

cuit Court of Appeals in its opinion states that the prosecuting attorney selected for introduction in evidence 72 of the some 500 telephone conversations to which the agents listened and of which they made notes. (R. 329.) The Circuit Court of Appeals further stated that enough of these messages were interstate and foreign as to render it unnecessary to make any distinction between what were purely intrastate and what were not (R. 331), and that the messages "had a vital part in the government's proof and if they were erroneously admitted reversal must follow without question." (R. 329.) The messages to which reference has been made were apparently those testified to by one Picarelli, an agent of the Alcohol Tax Unit. (R. 130–172, 174–186.) It is not contended that the tapping of the telephone wires was accomplished through any trespass committed upon property of the petitioners.

The Circuit Court of Appeals held that the evidence as to the telephone conversations was properly admitted and unanimously affirmed the convictions of the petitioners. (R. 327–332.) A petition for certiorari on the ground that Section 605 of the Communications Act of 1934 rendered such evidence inadmissible was granted.

SUMMARY OF ARGUMENT

1. The evidence obtained by wire tapping was admissible against petitioners under the decision of this Court in *Olmstead* v. *United States,* 277

U. S. 438. The only distinction in fact between that case and this is that there a State statute prohibited wire tapping and here it is urged that the wire tapping constituted a violation of Section 605 of the Communications Act of 1934. But that distinction is not material. The doctrine laid down in the *Olmstead* case is that since wire tapping does not violate the Constitution, evidence so obtained is admissible under the common law of evidence no matter how illegally obtained.

2. Section 605 of the Communications Act does not make evidence obtained by wire tapping inadmissible. Section 605 does not expressly purport to change the common law rule reaffirmed by the *Olmstead* case. Congress considered the *Olmstead* decision at length and rejected many express proposals to prohibit wire tapping and make evidence so obtained inadmissible. Thereafter, Congress passed the Communications Act of 1934. There is not the slightest indication in the legislative history of that Act that Congress was dealing with the question of wire tapping evidence in the Federal courts. The purpose of the Communications Act was to transfer administrative jurisdiction over Federal communications to the newly created Federal Communications Commission. Section 605 merely extended to wire communications the provisions of the Radio Act of 1927, prohibiting unauthorized publication of communications.

ARGUMENT

I

UNLESS THE LAW SETTLED BY THIS COURT IN *OLMSTEAD* V. *UNITED STATES* HAS BEEN CHANGED BY DIRECT LEGISLATION OF CONGRESS, THE DECISION IN THAT CASE IS CONTROLLING HERE

Petitioners contend that Congress in Section 605 of the Federal Communications Act of 1934 changed the law settled by this Court in *Olmstead* v. *United States,* 277 U. S. 438, and directly prohibited the introduction in evidence in a Federal criminal prosecution of conversations overheard by Federal agents by means of tapping telephone wires. Unless petitioners are right on that contention, which point is discussed *infra,* p. 12, there can be little question that the *Olmstead* case is controlling in the case at bar. This petitioners do not deny.

The question before the Court in the *Olmstead* case was the same as that here: Whether evidence obtained by Federal agents through the use of wire tapping is admissible in a Federal criminal prosecution. And this Court held that such evidence is admissible. There as here the contention was made by the petitioners that the interception of telephone messages by means of wire tapping was illegal. The only possible difference between the cases is that petitioners in the *Olmstead* case urged that the wire tapping activities of the Federal agents violated State law (277 U. S. 466),

whereas here it might be urged that Section 605 of the Federal Communications Act, *supra*, p. 2, was violated. But that difference is immaterial.

After holding that the obtaining of evidence by wire tapping does not violate the Constitution, the majority of this Court in the *Olmstead* case held that such evidence must be allowed under the common law rule that "the admissibility of evidence is not affected by the illegality of the means by which it was obtained." 277 U. S. at p. 467. Chief Justice Taft, writing for the majority, said (pp. 467–468):

> The rule is supported by many English and American cases cited by Jones in vol. 5, § 2075, note 3, and § 2076, note 6; and by Wigmore, vol. 4, § 2183. It is recognized by this Court in *Adams* v. *New York*, 192 U. S. 585. The *Weeks* case, announced an exception to the common law rule by excluding all evidence in the procuring of which government officials took part by methods forbidden by the Fourth and Fifth Amendments. Many state courts do not follow the *Weeks* case. . . . But those who do, treat it as an exception to the general common law rule and required by constitutional limitations. . . . The common law rule must apply in the case at bar.
>
> Nor can we, without the sanction of congressional enactment, subscribe to the suggestion that the courts have a discretion to exclude evidence, the admission of which is not unconstitutional, because unethically

secured. This would be at variance with the common law doctrine generally supported by authority. There is no case that sustains, nor any recognized text book that gives color to such a view. Our general experience shows that much evidence has always been receivable although not obtained by conformity to the highest ethics. The history of criminal trials shows numerous cases of prosecutions of oath-bound conspiracies for murder, robbery, and other crimes, where officers of the law have disguised themselves and joined the organizations, taken the oaths and given themselves every appearance of active members engaged in the promotion of crime, for the purpose of securing evidence. Evidence secured by such means has always been received.

A standard which would forbid the reception of *evidence if obtained by* other than nice ethical conduct by government officials would make society suffer and give criminals greater immunity than has been known heretofore. In the absence of controlling legislation by Congress, those who realize the difficulties in bringing offenders to justice may well deem it wise that the exclusion of evidence should be confined to cases where rights under the Constitution would be violated by admitting it.

Thus the decision of the majority, based as it is upon the presence or absence of an invasion of rights under the Constitution, recognizes no dis-

tinction between the violation of a Federal statute and the violation of a State statute by wire tapping. Cf. *Burdeau* v. *McDowell,* 256 U. S. 465; *Hester* v. *United States,* 265 U. S. 57; *McGuire* v. *United States,* 273 U. S. 95, 99.

The breadth of the majority's decision is further emphasized by the contentions of the minority which were rejected in the *Olmstead* case. Justices Holmes, Brandeis, and Stone dissented on the broad ground that the evidence obtained by wire tapping should be inadmissible regardless of any invasion of rights under the Constitution since it was obtained by unethical or criminal activity by Government officers.[1] It is clear that no distinction is made in their opinions between activity criminal under a State statute and activity criminal under a Federal statute. Justice Holmes expressly stated that "it makes no difference that in this case wire tapping is made a crime by the law of the State, not by the law of the United States." 277 U. S., at p. 470. And the rationale of "unclean hands" developed by Mr. Justice Brandeis (277 U. S., at pp. 483–485) is as applicable to violations of Federal law as it is to violations of State law.

---

[1] Justices Brandeis and Stone also dissented on the ground that obtaining evidence by wire tapping does invade rights guaranteed by the Fourth Amendment. Justice Butler dissented on the constitutional question alone and voiced no opinion as to the bearing of the ethics or criminal nature of wire tapping upon the admission of evidence obtained by wire tapping.

Finally, it is significant that the Federal courts have uniformly considered the *Olmstead* case controlling on the general proposition that in the absence of legislation by Congress evidence even though unethically or illegally obtained is admissible unless rights under the Constitution have been invaded. *Joong Sui Noon* v. *United States,* 76 F. (2d) 249 (C. C. A. 8th); *United States* v. *Lee Hee,* 60 F. (2d) 924 (C. C. A. 2d); *McMann* v. *Engel,* 16 F. Supp. 446, 448, affirmed without discussion of this point, 87 F. (2d) 377 (C. C. A. 2d); *In re Dooley,* 42 F. (2d) 562 (S. D. N. Y.); *United States* v. *Fifty-Eight Drums of Material,* 38 F. (2d) 1005 (W. D. Pa.)

Since there is no distinction between the present case and the *Olmstead* case, there was no error in the admission here of the evidence obtained by wire tapping, and the judgment below must be affirmed on the authority of the *Olmstead* case and the many Federal cases which have followed it.[2]

---

[2] The lower Federal courts in the following cases have held themselves bound by the authority of *Olmstead* v. *United States* on the specific question of admissibility of evidence obtained by wire tapping. *Beard* v. *United States*, 82 F. (2d) 837 (App. D. C. 1935), certiorari denied, 298 U. S. 655; *Foley* v. *United States*, 64 F. (2d) 1 (C. C. A. 5th, 1933), certiorari denied, 289 U. S. 762; *Morton* v. *United States*, 60 F. (2d) 696 (C. C. A. 7th, 1932), certiorari denied, 288 U. S. 607; *Smith* v. *United States*, 91 F. (2d) 556 (App. D. C., 1937); *Bushouse* v. *United States*, 67 F. (2d) 843 (C. C. A. 6th, 1933); *Kerns* v. *United States*, 50 F. (2d) 602 (C. C. A. 6th, 1931); and the decision below in the case at bar, 90 F. (2d) 630 (R. 327).

But petitioners maintain that Congress in Section 605 of the Federal Communications Act changed the rule of the *Olmstead* case and prohibited the admission of wire tapping evidence in the Federal courts. Our remaining argument is directed to this question.

II

SECTION 605 OF THE COMMUNICATIONS ACT OF 1934 DOES NOT CHANGE THE RULE OF *OLMSTEAD* V. *UNITED STATES*

The opinion of the Court in the *Olmstead* case points out that Congress may change the common law rule of evidence settled and reaffirmed in that case by legislation specifically prohibiting the introduction in Federal criminal trials of evidence obtained by wire tapping (277 U. S. at p. 465):

> Congress may of course protect the secrecy of telephone messages by making them when intercepted, inadmissible in evidence in federal criminal trials, by direct legislation, and thus depart from the common law of evidence.

The *Olmstead* case was decided in 1928. It is contended that Section 605 of the Communications Act of 1934, passed six years later, is the response of Congress to the suggestion of this Court that Congress could directly prohibit wire tapping evidence. That part of Section 605 relied on by appellants reads:

> * * * no person not being authorized by the sender shall intercept any communica-

> tion and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person * * *.

What was said by this Court in the *Olmstead* case in construing the Washington statute there involved [3] is equally applicable to Section 605. "This statute does not declare that evidence obtained by such interception shall be inadmissible, and by the common law already referred to, it would not be." 277 U. S. at p. 469.

Petitioners urge a construction of Section 605 in derogation of the common law, and their contention calls for an application of the familiar rule that a statute in derogation of the common law is to be strictly construed. This is particularly true here where the common law rule permitting evidence by wire tapping has been fully reaffirmed and restated by this Court in the widely discussed *Olmstead* decision. The intent of Congress to prohibit wire tapping evidence must plainly and affirmatively appear. It is inconceivable that Congress for reasons of grave public policy would reject the common law rule and repudiate the consequences of the *Olmstead* decision without due

[3] The pertinent provision of the Washington statute involved in the *Olmstead* case as set forth in the opinion in that case (p. 468) reads:

"Every person * * * who shall intercept, read or in any manner interrupt or delay the sending of a message over any telegraph or telephone line * * * shall be guilty of a misdemeanor."

consideration revealing its express intention to do so.

Examination of pertinent Congressional action since the *Olmstead* case not only fails to show the plain intention of Congress in Section 605 to prohibit the use of evidence obtained by wire tapping, but affirmatively demonstrates a complete lack of such intention.

(A) CONGRESS AFTER FULL CONSIDERATION OF OLMSTEAD V. UNITED STATES HAS REPEATEDLY DECLINED TO MAKE EVIDENCE OBTAINED BY WIRE TAPPING INADMISSIBLE IN THE FEDERAL COURTS

The 71st and 72d Congresses debated at length the decision of this Court in the *Olmstead* case, particularly with reference to the suggestion that a change in the common law to prohibit the admissibility of wire tapping evidence in Federal criminal trials was a question of policy for Congress to determine. Congressional committees gathered full data on the subject of wire tapping. Opponents of wire tapping in Congress endeavored many times to enact legislation prohibiting wire tapping and making evidence so obtained inadmissible. All proposed legislation to prohibit wire tapping and the use of evidence obtained by wire tapping was rejected by Congress.

Three bills were proposed in the 71st Congress to prohibit wire tapping, H. R. 5416, H. R. 4139, and S. 6061. H. R. 5416, designed also to pro-

hibit the use of wire tapping evidence in the courts of the United States, was entitled:

> A bill to prohibit the tapping of telephone and telegraph lines and prohibiting the use of information obtained by such illegal tapping to be used as evidence in the courts of the United States in civil suits and criminal prosecutions and for other purposes.

H. R. 5416, introduced on November 21, 1929, was debated on November 22, and its relationship to the *Olmstead* case discussed. Cong. Rec., Vol. 71, Part 5, p. 5968.

Congress gathered information on the extent of and necessity for the use of the wire tap, and eventually all three of the bills proposed to prohibit wire tapping and wire tapping evidence failed of passage.

In December, 1929, the House Appropriations Committee held hearings on the 1931 Department of Justice Appropriation Bill. The Director of the Federal Bureau of Investigation was called before the Committee and closely questioned on the practice of the Bureau in the tapping of telephone wires. Hearings of the Appropriations Committee of the House of Representatives on the Justice Department Appropriation Bill for the fiscal yea. 1931, December 2, 1929, p. 63.

The Department of Justice Appropriation Bill was debated in the House on January 22, 1931. An amendment was offered providing that no part of

the appropriation could be used for tapping telephone or telegraph wires. Representative Tinkham in support of the amendment read extensively from the dissenting opinions of Justices Brandeis and Holmes in the *Olmstead* case. Five pages of the Congressional Record record the heated discussion of the amendment. Cong. Rec., Vol. 74, Part 3, pp. 2901–2906. It was defeated by a vote of 99 to 78.

Shortly thereafter an amendment to the National Prohibition Act for the District of Columbia to prohibit wire tapping was proposed in the Senate. An amendment to the amendment was proposed to prohibit the use of information so obtained as evidence of violations. Cong. Rec., Vol. 74, Part 4, p. 3928. Neither the original amendment, nor the amendment thereto, was finally incorporated in the bill.

Again, Congress made a thorough inquiry as to the extent of the use of, and necessity for, the wire tap. On February 19, 1931, the House Committee on Expenditures in Executive Departments met to ascertain the regulations and practices employed by the Government's investigative units in making use of wire tapping. Attorney General Mitchell and Prohibition Director Woodcock were called to appear before the Committee which held hearings in addition and supplementary to the hearings before the House Appropriations Committee in 1929. The hearings were published and made available to all the members of Congress. The evidence sub-

mitted at these hearings is highly significant in showing what information was in the possession of Congress at the various times it considered and rejected proposals to prohibit or limit wire tapping, and make wire tapping evidence inadmissible. The information given to Congress at this hearing may be classified as follows: (1) Regulations of the Department of Justice restricting the use of the wire tap in investigation; (2) the text of prevailing State statutes prohibiting wire tapping; (3) an analysis of all methods of investigation and the part played by wire tapping in the general scheme; (4) description of the limited class of cases in which the wire tapping device was considered necessary; (5) a table showing the very small proportion of cases in which the wire tap was used; (6) general statement of policy regarding the use of the wire tap. The text of the statutes of 32 States which prohibit wire tapping was before the Committee, and it is notable that not one of those statutes made evidence obtained by wire tapping inadmissible in criminal proceedings. Hearings, Committee on Expenditures in the Executive Departments, February 19, 1931, pp. 5–14.

Extracts from the printed hearings of the testimony and exhibits presented by Attorney General Mitchell showed that under the regulations and policy of the Department of Justice wire tapping is strictly confined to infrequent but apparently necessary emergency use in combatting highly-organized crime syndicates.

Extracts from the report of the hearings follow:

Page 2: Order of the Attorney General of January 19, 1931 (still in effect):

> No tapping of wires should be permitted to any agent of the Department without the personal direction of the Chief of the Bureau involved, after consultation with the Assistant Attorney General in charge of the case.

Page 17: Analysis of the available methods of investigation against highly organized crime syndicates:

> 4. The various avenues of investigation open to the Bureau against such a syndicate may be substantially classified as follows:
>
> (1) Open investigation.
>
> (a) Following logically all leads originating from some substantive violation to their final analysis.
>
> (b) Statements to be obtained from disinterested parties who, by virtue of a particular position that they are in, are in a position to know of some element of the crime.
>
> (c) Statements to be obtained from employees of the syndicate, or, in other words, confessions.
>
> (2) Undercover investigation.
>
> (a) The placing of a duly authorized agent into the syndicate, under the subterfuge of an employee, through whatever medium is available.
>
> (b) The purchase of liquor by an authorized agent, with a view to a substantive offense case.

(c) The use of the paid or unpaid informant.

(d) Shadowing, observing, and all undercover mediums (not effective alone and usually only corroborative).

(e) Statements to be obtained from employees of the syndicate, or, in other words, wire tapping.

5. First considering the subject of open investigation, this medium, of course, is necessarily the one by which all cases are ultimately perfected. However, against the highly organized liquor syndicate it is virtually useless, unless an undercover background has been skillfully laid upon which an open investigation may be predicated. * * *

6. Times have changed. The highly organized syndicate, or mob, with its methods of intimidation, its strong political connections, and its highly organized illegal methods of procedure renders the sole method of open investigation entirely inadequate. * * *

10. All other means of undercover investigation against the large syndicate, such as shadowing, observing, etc., when used alone are not effective and are usually corroborative as investigative mediums.

11. Now coming to the wire tap, after having eliminated other means when used alone or together as not being adequate, I shall discuss the necessity of the wire tap as against the syndicate. * * *

13. In eliminating the various other methods of investigation as against the liquor syndicate, I do not want it understood that such methods of investigation are not usable against the large syndicate. These are very valuable, and are used in conjunction with wire tap investigation and all other methods. Wire tapping is an emergency means of investigation. It is the type of investigation that is to be used when all other methods fail. * * *

Page 20: Detailed description of types of cases in which wire tapping was found necessary:

774–M. This case relates to the conspiracy on the part of 32 individuals operating in and around Terre Haute, Ind. This combine was headed by some six members of the old Traum gang, bank robbers in Illinois both prior to and since prohibition. This combine operated under its immediate supervision 37 large stills in and around Terre Haute. All of the stills in question were not owned by the syndicate, but were syndicated and tribute of some $15,000 a week was exacted from the independent operators. Numerous murders were committed during the operation of the conspiracy by this gang, some of which were cleared up in connection with the investigation. Six machine guns were seized. One of the principals in this case, Jake Traum, was arrested in connection with the Lingle murder in Chicago. Twenty-nine of the thirty-two defendants in this case were convicted by jury.

574–M. This case involves four members of the notorious "Purple gang" in Detroit, all four of whom were convicted and given the maximum sentence under the statute under which they were indicted. These individuals had been acquitted in the State court at Detroit on charges of murder, kidnapping, extortion, and other major crimes. This combine was also given a great deal of publicity by the newspapers following the St. Valentine's day massacre in Chicago, as being perpetrators of that crime.

177–S. This case involves the Pascuzzi-Goldberg gang in Detroit. The principals in this combine were convicted as the result of a wire-tap investigation, one of whom was Joe Moceri, listed as a public enemy in Detroit and recently held in connection with the Buckley radio murder there. Another defendant also convicted in the same case was Sam Goldberg, former New York confidence man, who did a long stretch at Sing Sing Penitentiary in New York at one time.

Page 21: Table showing the proportionate number of cases in which the wire tap was used:

	Total number of cases in which wire tap was used	Total number of cases made in the bureau
1928	6	57,973
1929	40	60,664
1930 [1]	60	57,228

[1] Larger number in 1930 may be due to bureau's effort to concentrate on larger cases.

Page 24: Statement of Attorney General Mitchell concerning wire tapping and intercepting radio messages:

> Of course, the question of wire tapping is a broad one. It involves the general question of what you might call eavesdropping, and it is a question of how polite the Government is going to be in its efforts to detect crime. I do not believe that anybody disagrees about the proposition that indiscriminate wire tapping ought not to be allowed. If it is to be used at all, it should be used in a limited class of cases under the most careful supervision. These gangsters and desperate criminals, whether they are violating the prohibition law or any other law, are equipped with every modern convenience and every modern invention. They are difficult to deal with. If you prohibit wire tapping, you must consider a lot of other things. You must consider whether you will prohibit eavesdropping and require detectives in a position to overhear conversations to refrain from doing so.
>
> Then there is the question of radio, and I would like to call the attention of the committee to the situation about that. In Forty-fourth Statutes at Large, page 1172, United States Code, title 47, section 107, there is a statute that prohibits the divulging of the contents of any radio communication to any persons other than the addressee, and the interception of any message and divulging its contents to an unauthorized per-

son. That is a Federal statute, and it does not say anything about police officers or Federal officers at all. I think, however, it it has been construed not to apply to Federal officers, because the Commerce Department itself is busily engaged all the time in checking and intercepting messages for the purpose of preventing the improper use of radio, and I know that the Prohibition Unit has detected and brought to punishment some of the biggest liquor importation, smuggling, and conspiracy cases that we have had along the Atlantic coast where radio has been used and radio messages intercepted.

Page 27: Dialogue between Attorney General Mitchell and Congressman Schafer, the author of H. R. 5416, *supra:*

Mr. MITCHELL. The order I made requires that there shall not be any wire tapping under any bureau unless the particular circumstances of the individual case are brought to the attention of the chief of the bureau and the Assistant Attorney General, to determine whether it is a case that justifies it. There is one thing that we should bear in mind about this subject, and that is that nowadays a good many of the rules of law that regulate the Government in its efforts to detect crimes or criminals are being established by the courts in cases that are coming up involving the prohibition law, and that public sentiment about such things as wire tapping is being crystallized, appar-

ently, under conditions of that kind. Now, what is sauce for the goose is sauce for the gander, and it makes a lot of difference whose ox is being gored. For my part it seems to me that we should give it very careful consideration before we adopt any rule that forbids a practice of this kind under all conditions. I can imagine many cases where I would be willing to say right now that I would resort to wire tapping. A Bureau of Investigation agent was found shot to death a few months ago under circumstances that indicated that a gang of narcotic traffickers had "bumped" him off.

Now, if some agent of the Bureau of Investigation had come around to me and said that they had reason to believe that they could bring the perpetrators of that crime to justice, or that they could detect the perpetrators of the crime by tapping his telephone wires, I would have had great difficulty in saying, "I do not think it ought to be done." There are a great many other cases coming up where you might, I think, hesitate yourself to reach a decision about it. I was not prepared in January to lay down an iron-clad rule to apply to all cases under all circumstances, and I am not prepared to do that now.

Mr. SCHAFER. You have taken several long steps in the right direction. Now, if my understanding of your regulation promulgated in January is correct, when these Federal prohibition agents or special agents are operating, they can not tap a telephone

or telegraph wire unless they present reasonable facts in behalf of their request, and that request is favorably acted upon by the chief of the bureau.

Mr. MITCHELL. That is true. Now, you will find, if you will look at this paper containing a statement of those cases in which the bureau has resorted to wire tapping, that they are cases in which they were dealing with gangsters and desperate criminals. These modern gangsters, with whom liquor is only one of the rackets, have no regard for life, property, decency, or anything else. They are a desperate lot, and they use every scientific method to escape detection. I have no doubt that they tap the wires leading into the offices of the United States attorneys and prohibition offices in order to find out what is being done. It would be handicapping the Government to prevent wire tapping by it in such cases, * * *.

Page 31: Attorney General Mitchell:

I want to call attention to the fact that, as far as I have gone on this subject in the brief time I have had to give any consideration to it, I have reached the conclusion that the indiscriminate use of wire tapping in any bureau of the department ought not to be permitted; and I made a regulation which does not permit wire tapping in any case but leaves it open for decision in any concrete case that might come up as to whether it should be resorted to or not.

With prohibition still in effect, the question of wire tapping was still a very live one in the 72d

Congress. Four separate bills were proposed prohibiting wire tapping and making evidence obtained by wire tapping inadmissible—H. R. 23, H. R. 5305, H. R. 9893, and S. 1396. None passed.

H. R. 23, introduced on December 8, 1931, prohibited the use of the wire tap to officers of the United States, and made evidence so obtained inadmissible in any court of the United States. H. R. 5305, introduced on December 10, 1931, was a companion measure to S. 1396, introduced on the same day and entitled:

> A bill to render evidence obtained by wire tapping inadmissible in the Federal Courts.

H. R. 9893 was introduced February 27, 1932, and was entitled:

> A bill to prohibit the tapping of telephone and telegraph lines and prohibit the use of information obtained by such illegal tapping to be used as evidence in the Courts of the United States in civil suits and criminal prosecutions and for other purposes.

Once again on February 23, and again on February 25, 1932, the subject of obtaining evidence by wire tapping was debated in the House of Representatives, and again reference was made to this Court's decision in the *Olmstead* case. Cong. Rec., Vol. 75, Part 4, pp. 4546, 4733. The Committee on the Judiciary of the House of Representatives asked the Attorney General on April 11, 1932 for a report and recommendation on H. R. 5305, *supra*. The Attorney General replied on May 9, 1932:

> I do not recommend enactment of this measure. Regulations in force in this Department prohibit wire tapping without the express permission, in every case, of the chief of the investigative bureau dealing with the case and of the Assistant Attorney General in charge.

The Department of Justice Appropriation Act for the year ending June 30, 1934, approved March 1, 1933, contained the following provision:

> *Provided,* That no part of this appropriation shall be used for or in connection with "wire tapping" to procure evidence of violations of the National Prohibition Act, as amended and supplemented: * * * [47 Stat. 1381.]

An amendment to the provision submitted in the Senate on February 10, 1933, to except such cases of wire tapping as were authorized by the Assistant Attorney General in charge of prosecuting violations of the National Prohibition Act, was tabled. Cong. Rec., Vol. 76, Part 4, p. 3745. The provision enacted was passed after extensive debate in the Senate with further consideration of the *Olmstead* case. Cong. Rec., Vol. 76, Part 4, pp. 4235–4242.

The provision of the Department of Justice Appropriations Act for the year 1934 was confined to prohibiting the use of appropriations for wire tapping only so far as securing evidence for violations of the National Prohibition Act was concerned. Its duration was limited to one year, the last year the 18th Amendment was in effect. It was the only

direct restriction passed by Congress on the use of wire tapping since the decision of this Court in the *Olmstead* case. The extensive debates and hearings on the various rejected proposals to prohibit or limit wire tapping and make evidence so obtained inadmissible readily suggest that the antipathy in Congress, such as it was, toward the limited practice of wire tapping, was primarily concerned with wire tapping for the purpose of securing convictions under the increasingly unpopular 18th Amendment and the National Prohibition Act. With the repeal of prohibition the interest of Congress in legislation prohibiting wire tapping and making evidence so obtained inadmissible seems to have gone. Except for Section 605 of the Communications Act passed by the 73d Congress, not one proposal in the 73d, 74th and 75th (first session) Congresses related to the subject of wire tapping.

(B) SECTION 605 OF THE FEDERAL COMMUNICATIONS ACT OF 1934

The acrimonious, lengthy debates and extensive Congressional investigations which accompanied the rejection of the many proposals to prohibit wire tapping and wire tapping evidence should be contrasted with the passage of the Federal Communications Acts of 1934. Debates in Senate and House, during which many phases of the Communications Act were discussed, are silent on the subject of wire tapping, and on Section 605. Not one word is said about making evidence obtained by

wire tapping inadmissible in evidence, or about prohibiting wire tapping. The *Olmstead* case is nowhere mentioned. See Cong. Rec., 73d Cong., 2d Sess. pp. 4138, 8822–8837, 8842–8854, 10304–10332.

Indeed the intent of Congress in passing the Communications Act was apparently not to change existing law but only to change administrative jurisdiction over enforcement of the presently existing regulatory measures for interstate communications. The Committee on Interstate and Foreign Commerce of the House of Representatives in its report on the Communications Act states:

> * * * it is the primary purpose of this bill to create such a commission armed with adequate statutory powers to regulate all forms of communication and to consider needed additional legislation. The bill is largely based upon existing legislation and except for the change of administrative authority does not very greatly change or add to existing law; most controversial questions are held in abeyance for a report by the new commission recommending legislation for their solution. [H. Rept. No. 1850, 73d Cong. 2d Sess., p. 3.]

The report of the Senate Committee on Interstate Commerce in submitting the Communications Act of 1934 says of the purpose of that Act:

> The purpose of this bill is to create a Communications Commission with regulatory power over all forms of electrical com-

> munication, whether by telephone, telegraph, cable, or radio. [S. Rept. No. 781, 73d Cong., 2d Sess., p. 1.]

So too it was the understanding of the chairmen of both Congressional committees which considered the bill that it merely provided new administration of old regulatory law. Chairman Dill explained the effect of the Communications Act to the Senate:

> The bill * * * simply writes into law the existing provisions relating to the control of the telephone and telegraph business now contained in the Interstate Commerce Act, and the provisions of the radio law * * * now being enforced by the Federal Radio Commission. [Congressional Record, 73d Cong. 2d Sess. p. 4138.]

And to identical effect is the explanation of the bill by Chairman Rayburn in the House:

> * * * the bill as a whole does not change existing law, not only with reference to radio but with reference to telegraph, telephone, and cable, except in the transfer of the jurisdiction and such minor amendments as to make that transfer effective. [*Id.* p. 10313.]

And that such, too, was the understanding of the whole House is further evidenced by the following dialogue, there occurring:

> Rep. FULMER. Is it not a fact that about all this bill hopes to accomplish is to transfer the activities of the Radio Commission

> and certain jurisdiction on the part of the Post Office Department and the Interstate Commerce Commission to this new commission?
>
> Mr. MERRITT [Member of the Committee]. That is right. [*Id.* p. 10317.]

If Congress in passing a bill which was intended to effect a change in administrative jurisdiction over interstate communications, had, nevertheless, also intended to repudiate the doctrine of the *Olmstead* case, it would have used language expressly prohibiting the use in the Federal courts of evidence obtained by wire tapping. With such express language, Congress was long familiar. At least, Congress would have gone as far as did the statute in the *Olmstead* case, see p. 13, *supra*, and denounced the act of wire tapping. But Section 605 does not denounce wire tapping *per se* but provides "no person not being authorized by the sender shall *intercept* any communication *and divulge or publish*" etc. Interception is coupled with publication, and it is the combination of both which constitutes the act denounced. That the purpose of the language quoted was to prohibit unauthorized publication rather than wire tapping is shown by its context in Section 605, and by the Committee reports. The provisions of Section 605, *supra*, p. 2, are as a whole directed at unauthorized publication. And the Committee reports in explaining the intent of Section 605 state:

> Section 605, prohibiting unauthorized publication of communications, is based

> upon Section 27 of the Radio Act and extends it to wire communications. [S. Rept. No. 781, 73d Cong., 2d Sess., p. 11.]
>
> Section 605, prohibiting unauthorized publication of communications, is based upon Section 27 of the Radio Act but is also made to apply to wire communications. [H. Rept. No. 1850, 73d Cong., 2d Sess. p. 9.]

As stated by the Committee reports, Section 605 merely carried over the provisions of Section 27 of the Radio Act of 1927 into the Communications Act of 1934, and there applied those provisions to wire communications as well as radio. Indeed the language in Section 605 relied on by petitioners is identical except for one word with the language of Section 27 of the Radio Act of 1927:

> * * * no person not being authorized by the sender shall intercept any message and divulge or publish the contents, substance, purport, effect, or meaning of such intercepted message to any person * * *. [Act of February 23, 1927, c. 169, Sec. 27, 44 Stat. 1162, 1172.]

The Communications Act of 1934 changed the word "message" to the word "communication". The Radio Act was in effect at the time *Olmstead* v. *United States* was decided and was called to the Court's attention by counsel, contending that it protected the privacy of communications, 277 U. S. 446; and the Act is quoted in a footnote to the dissenting opinion of Mr. Justice Brandeis, p. 481.

It cannot be thought that without discussion and by changing one word Congress intended to alter the effect of a leading decision of this Court affirming an established common law principle.

That Congress in Section 605 did not intend to eliminate evidence of telephone conversations is further evidenced by the care Congress took in providing in that section:

> No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish * * * to any person other than the addressee * * * except * * * in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; * * *

The provision applies as much to telephones as it does to radio and telegraph. Because of obvious physical limitations, however, a search warrant or subpena for a telephone message would be ineffective. The provision quoted guards in effect against loss to the courts of relevant evidence contained in telegrams and radiograms. The letters, private effects, telegrams and radiograms of criminal conspirators can be made available by search warrant and subpena. We do not believe that Congress intended their telephone conversations to be immune. Managers of such conspiracies, far from the scene of action, might otherwise direct every step of the operations of their agents and yet, in those cases where wire tapping affords the only

available evidence, be secure in the knowledge that their relationship to the crime could not be revealed in court.

Despite these considerations, and despite the criticism leveled at the doctrine of *Weeks* v. *United States*, 232 U. S. 383,[4] Congress might, of course, repudiate the doctrine of the *Olmstead* decision and make inadmissible in the Federal courts evidence obtained by interception of telephone messages. Cf. the reasoning of Justice Brandeis at p. 474 of his dissenting opinion in the *Olmstead* case. But there is nothing to indicate that Congress so intended in passing the Communications Act of 1934.

Indeed, petitioners' construction of Section 605 violates a fundamental principle of statutory construction. The principle, old in the common law (see *Blackstone's Commentaries,* Book I, p. 247; *Kent's Commentaries,* p. 460), was concisely stated by Justice Story, sitting in the Circuit Court for the First Circuit in the case of *United States* v. *Samuel Hoar,* 2 Mason 311, 314–315:

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[4] In *Weeks* v. *United States* and cases following it, this Court laid down the doctrine that admission of evidence, obtained by search and seizure of Federal officers in violation of the Fourth Amendment, would constitute a violation of the Fifth Amendment. Hence it is held in those cases that evidence so obtained is inadmissible. That exception to the common law rule, although based upon constitutional limitations, was nevertheless rejected by the large majority of State courts. See *People* v. *Defore,* 242 N. Y. 13, certiorari denied, 270 U. S. 657, and authorities therein cited.

> It appears to me, therefore, to be a safe rule founded in the principles of the common law, that the general words of a statute ought not to include the government, or affect its rights, unless that construction be clear and indisputable upon the text of the act * * *

The principle has various modern applications. See, for example, *People* v. *Hebberd,* 96 Misc. 617, 620 (Sup. Ct. N. Y.) (Police Commissioner did not wrongfully and criminally obtain knowledge of telephone conversations since he acted only in official capacity for detection of crime); *Balthasar* v. *Pacific Electric Ry. Co.,* 187 Calif. 302 (Motor Vehicle Act not applicable to the Government or its agencies unless expressly included by name); *Lilly* v. *West Virginia,* 29 F. (2d) 61 (C. C. A. 4th) (speed statute, containing no express exclusion from broad general provisions, not applicable to law enforcement officers). Here if Section 605 is to exclude evidence proffered by the United States in the Federal courts then the phrase "no person . . . shall intercept . . . and divulge . . . to any person" must be construed as including the Government of the United States. But as this Court held in *Dollar Savings Bank* v. *United States,* 19 Wall. 227, 239, "the most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect not" the Government of the United States "in the least" unless

it be named in the statute by "special and particular words."

Finally, it should be noted that the contention of petitioners goes both too far and not far enough. If the language "no person not being authorized by the sender shall intercept any communication and divulge or publish * * * to any person" were to include divulgence by way of evidence in the Federal courts, then such language would also include divulgence in the State courts. There could be no differentiation between Federal and State courts in the language quoted. Thus Congress would be establishing a rule of evidence for the State courts. But nowhere is there to be found any indication of the intention of Congress to exercise so doubtful a jurisdiction. Cf. *Olmstead* v. *United States,* at p. 469; *Craig* v. *Dimock,* 47 Ill. 308; *Hunter* v. *Cobb,* 1 Bush (Ky.) 239. Nor could any differentiation be made on this language between evidence obtained by the wire tapping of Federal officers, and evidence obtained by the wire tapping of State officers and other individuals. Yet there is not the slightest evidence of the intention of Congress to reject the doctrine of the decisions of this Court in *Burdeau* v. *McDowell,* 256 U. S. 465; *Center* v. *United States,* 267 U. S. 575; *Weeks* v. *United States,* 232 U. S. 383, 389. These cases establish the rule that the Federal Government, in the absence of wrongdoing on the part of its officers, may use evidence no matter how it was obtained by individuals (usually State officers) un-

connected with the Federal Government or Federal officers.

If Congress saw fit to change the rule of the *Olmstead* case, it could prohibit the introduction in evidence in the Federal courts of all intercepted messages whether such messages were interstate or not. But Section 605, especially when read in the light of the purpose stated in Section 1 of "regulating interstate and foreign commerce in communication by wire and radio * * *,"[5] applies only to interstate messages. Thus if petitioners are right in their contention that Section 605 prohibits the admissibility of evidence obtained by wire tapping, interstate messages are to be excluded, but intrastate messages may be admitted. Yet such distinction bears no relation whatever to a policy of making evidence obtained by wire tapping inadmissible. It is not reasonably conceivable that Congress, with full power to prohibit all wire tapping evidence in the Federal courts, should for no apparent reasons of policy stop short at the arbitrary line of distinction between interstate and intrastate communications.

(C) CASE LAW ON THE EFFECT OF SECTION 605 UPON THE RULE OF THE OLMSTEAD CASE

That Section 605 does not affect the admissibility in evidence of conversations overheard by tapping telephone wires is the opinion of the only two

[5] 48 Stat. 1064.

Federal appellate courts which have passed on the question. The court below held, 90 F. (2d) 630 (R. 331):

> The above mentioned statute subsequently passed by Congress is silent as to the admissibility of messages intercepted contrary to its provisions. As Congress did not see fit to adopt the suggestion of direct legislation to make such evidence inadmissible, we are, of course, bound to enforce the law as declared in the above case [*Olmstead* v. *United States*]. That would dispose of the point flatly were it a state rather than a federal law which forbade the interception of these messages. Yet in principle there is no distinction. Since there is no constitutional prohibition of their admission in evidence, it is necessary to their exclusion that some statute must so provide. Evidently Congress did not care for such a policy.

The Court of Appeals for the District of Columbia in *Smith* v. *United States,* 91 F. (2d) 556 (App. D. C., 1937), with the same question before it held:

> The second assignment relied upon by appellants is that evidence secured by wire tapping was admitted by the trial court against the objections and exceptions of appellants. This assignment must be overruled upon the authority of *Olmstead* v. *United States,* 277 U. S. 438. See also *Beard* v. *United States,* 65 App. D. C. 231; 82 F. (2d) 837. It is also alleged by appellants that such evidence was illegal under

> the provisions of the act of Congress commonly known as the Communications Act of 1934, sec. 605, title 47, U. S. C. We cannot, however, sustain this contention. *Olmstead* v. *United States, supra.*

Cf. *Cole* v. *Ralph,* 252 U. S. 286, 293-294; *United States* v. *Viess,* 273 Fed. 279 (W. D. Wash.). Moreover, although the Communications Act was not the basis of the petitions for certiorari, this Court after the Act was passed denied certiorari in two cases upholding the admissibility of intercepted telephone messages. *Jenello* v. *United States,* 10 F. Supp. 751 (M. D. Pa., 1935), reversed, 78 F. (2d) 1020 (C. C. A. 3d, 1935), certiorari denied, 296 U. S. 623, rehearing denied, 296 U. S. 662; *Beard* v. *United States,* 82 F. (2d) 837 (App. D. C., 1935), certiorari denied, 298 U. S. 655. And finally it may be noted that, despite numerous State statutes prohibiting wire tapping, see p. 17, *supra,* and *Olmstead* v. *United States,* at p. 479, note 12, petitioners do not cite, nor have we been able to find, any case which construes such a statute as making evidence obtained by wire tapping inadmissible.

Hearst v. *Black,* 87 F. (2d) 68 (App. D. C.), relied on by petitioners, is not relevant to the question at bar. Hearst in that case sued for an injunction to restrain a Senate Committe and the Federal Communications Commission from making use of copies of telegrams in the possession of

the telegraph company which had been sent by Hearst to his employees. Under allegations of the bill, deemed admitted, the defendants had examined and copied many telegrams sent by Hearst which had no relation to the matters under investigation by the Senate Committee. The District Court dismissed the bill for lack of jurisdiction as against the Senate Committee, and denied an injunction against the Commission on the disclaimer of the Commission of any further activity against the plaintiff. The appellate court affirmed. There are dicta in its opinion to the effect that the alleged action of the Commission in arbitrarily seizing numerous messages sent by Hearst was illegal. But the court did not purport in any way to pass upon the effect of Section 605 in making inadmissible evidence obtained by wire tapping or any other means.

Several questions not pertaining to the admissibility of the evidence obtained by wire tapping are urged on behalf of petitioner Nardone. The question involved in the joint petition for certiorari filed by all petitioners is stated to be (p. 3):

> Assuming that the interception of telephone messages was unlawful, was their introduction into evidence error?

Under the heading "Specifications of Errors to be Urged" in the petition there appears only the following (pp. 5–6):

> It is respectively submitted that the Circuit Court of Appeals misinterpreted the

explicit provisions of Title 47, U. S. C. A., Section 605, which is a part of the Federal Communications Act of June 19th, 1934, in approving of the introduction into evidence of the contents of 72 telephone messages, many of which were interstate, unlawfully intercepted by government agents, in an attempt to obtain evidence against these defendants.

The entire argument of the petitioner and "Reasons for Allowance of Writ" (pp. 4, 6–8) are directed to the sole question of the admissibility of wire tapping evidence under Section 605 of the Communications Act of 1934. The petitioners may not here urge other contentions which are entirely unrelated to that question. *Prudence Co.* v. *Fidelity & Deposit Co.*, 297 U. S. 198, 208; *Helvering* v. *Taylor*, 293 U. S. 507, 511; *Steele* v. *Drummond*, 275 U. S. 199, 203.

CONCLUSION

For the foregoing reasons the judgment of the court below should be affirmed.

Respectfully submitted.

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NOVEMBER 1937.

U. S. GOVERNMENT PRINTING OFFICE: 1937

SUPREME COURT OF THE UNITED STATES.

No. 190.—October Term, 1937.

Frank Carmine Nardone, et al., Petitioners, *vs.* The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[December 20, 1937.]

Mr. Justice Roberts delivered the opinion of the Court.

The importance of the question involved,— whether, in view of the provisions of Section 605 of the Communications Act of 1934,[1] evidence procured by a federal officer's tapping telephone wires and intercepting messages is admissible in a criminal trial in a United States District Court,—moved us to grant the writ of certiorari.

The indictment under which the petitioners were tried, convicted, and sentenced, charged, in separate counts, the smuggling of alcohol, possession and concealment of the smuggled alcohol, and conspiracy to smuggle and conceal it. Over the petitioners' objection and exception federal agents testified to the substance of petitioners' interstate communications overheard by the witnesses who had intercepted the messages by tapping telephone wires. The court below, though it found this evidence constituted such a vital part of the prosecution's proof that its admission, if erroneous, amounted to reversible error, held it was properly admitted and affirmed the judgment of conviction.[2]

Section 605 of the Federal Communications Act provides that no person who, as an employe, has to do with the sending or receiving of any interstate communication by wire shall divulge or publish it or its substance to anyone other than the addressee or his authorized representative or to authorized fellow employes, save in response to a subpoena issued by a court of competent jurisdiction or on demand of other lawful authority; and "no person not being

[1] Ch. 652, 48 Stat. 1064, 1103; U. S. C. Tit. 47, § 605.

[2] 90 F. (2d) 630. See also Smith v. United States, 91 F. (2d) 556.

authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person; . . .'" Section 501[3] penalizes wilful and knowing violation by fine and imprisonment.

Taken at face value the phrase "no person" comprehends federal agents, and the ban on communication to "any person" bars testimony to the content of an intercepted message. Such an application of the section is supported by comparison of the clause concerning intercepted messages with that relating to those known to employes of the carrier. The former may not be divulged to any person, the latter may be divulged in answer to a lawful subpoena.

The government contends that Congress did not intend to prohibit tapping wires to procure evidence. It is said that this court, in *Olmstead* v. *United States,* 277 U. S. 438, held such evidence admissible at common law despite the fact that a state statute made wire-tapping a crime; and the argument proceeds that since the *Olmstead* decision departments of the federal government, with the knowledge of Congress, have, to a limited extent, permitted their agents to tap wires in aid of detection and conviction of criminals. It is shown that, in spite of its knowledge of the practice, Congress refrained from adopting legislation outlawing it, although bills, so providing, have been introdueed. The Communications Act, so it is claimed, was passed only for the purpose of reenacting the provisions of the Radio Act of 1927[4] so as to make it applicable to wire messages and to transfer jurisdiction over radio and wire communications to the newly constituted Federal Communications Commission, and therefore the phraseology of the statute ought not to be construed as changing the practically identical provision on the subject which was a part of the Radio Act when the *Olmstead* case was decided.

We nevertheless face the fact that the plain words of Section 605 forbid anyone, unless authorized by the sender, to intercept a telephone message, and direct in equally clear language that *"no person"* shall divulge or publish the message or its substance to *"any person"*. To recite the contents of the message in testimony before a court is to divulge the message. The conclusion that the act forbids such testimony seems to us unshaken by the government's arguments.

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[3] Ch. 652, 48 Stat. 1064, 1100, U. S. C. Tit. 47, § 501.

[4] Act of Feb. 23, 1927, ch. 169, 44 Stat. 1162.

True it is that after this court's decision in the *Olmstead* case Congressional committees investigated the wire-tapping activities of federal agents. Over a period of several years bills were introduced to prohibit the practice, all of which failed to pass. An Act of 1933 included a clause forbidding this method of procuring evidence of violations of the National Prohibition Act.[5] During 1932, 1933 and 1934, however, there was no discussion of the matter in Congress, and we are without contemporary legislative history relevant to the passage of the statute in question. It is also true that the committee reports in connection with the Federal Communications Act dwell upon the fact that the major purpose of the legislation was the transfer of jurisdiction over wire and radio communication to the newly constituted Federal Communications Commission. But these circumstances are, in our opinion, insufficient to overbear the plain mandate of the statute.

It is urged that a construction be given the section which would exclude federal agents since it is improbable Congress intended to hamper and impede the activities of the government in the detection and punishment of crime. The answer is that the question is one of policy. Congress may have thought it less important that some offenders should go unwhipped of justice than that officers should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty. The same considerations may well have moved the Congress to adopt Section 605 as evoked the guaranty against practices and procedures violative of privacy, embodied in the Fourth and Fifth Amendments of the Constitution.

The canon that the general words of a statute do not include the government or affect its rights unless the construction be clear and indisputable upon the text of the act does not aid the respondent. The cases in which it has been applied fall into two classes. The first is where an act, if not so limited, would deprive the sovereign of a recognized or established prerogative title or interest.[6] A classical instance is the exemption of the state from the operation of

[5] Department of Justice Appropriation Act of March 1, 1933, 47 Stat. 1381.

[6] The Dollar Savings Bank *v.* United States, 19 Wall. 227, 239; United States *v.* Herron, 20 Wall. 251, 263; United States *v.* American Bell Telephone Co., 159 U. S. 548, 554; United States *v.* Stevenson, 215 U. S. 190, 197; Title Guaranty & Surety Co. *v.* Guarantee Title & Trust Co., 174 Fed. 385, 388; Maxwell, Interpretation of Statutes (7th Ed.) 117, 121; Black on Interpretation of Laws (2d Ed.) 94.

general statutes of limitation.[7] The rule of exclusion of the sovereign is less stringently applied where the operation of the law is upon the agents or servants of the government rather than on the sovereign itself.[8]

The second class,—that where public officers are impliedly excluded from language embracing all persons,—is where a reading which would include such officers would work obvious absurdity as, for example, the application of a speed law to a policeman pursuing a criminal or the driver of a fire engine responding to an alarm.[9]

For years controversy has raged with respect to the morality of the practice of wire-tapping by officers to obtain evidence. It has been the view of many that the practice involves a grave wrong. In the light of these circumstances we think another well recognized principle leads to the application of the statute as it is written so as to include within its sweep federal officers as well as others. That principle is that the sovereign is embraced by general words of a statute intended to prevent injury and wrong.[10]

The judgment must be reversed and the cause remanded to the District Court for further proceedings in conformity with this opinion.

So ordered.

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[7] United States *v.* Hoar, 2 Mason, 311, 314-315.

[8] "The prohibitions [against any form of action except that specified in the statute] if any, either express or implied . . . are for others, not for the government. They may be obligatory on tax collectors. They may prevent any suit at law by such officers or agents." The Dollar Savings Bank *v.* United States, 19 Wall. 227, 239. "These provisions unmistakably disclose definite intention on the part of Congress effectively to safeguard rivers and other navigable waters against the unauthorized erection therein of dams or other structures for any purpose whatsoever. The plaintiff maintains that the restrictions so imposed apply only to work undertaken by private parties. But no such intention is expressed, and we are of opinion that none is implied. The measures adopted for the enforcement of the prescribed rule are in general terms and purport to be applicable to all. No valid reason has been or can be suggested why they should apply to private persons and not to federal and state officers. There is no presumption that regulatory and disciplinary measures do not extend to such officers. Taken at face value the language indicates the purpose of Congress to govern conduct of its own officers and employees as well as that of others." United States *v.* Arizona, 295 U. S. 174, 184. Compare Stanley *v.* Schwalby, 147 U. S. 508, 515; Donnelley *v.* United States, 276 U. S. 505, 511.

[9] Balthasar *v.* Pacific El. Ry. Co., 187 Cal. 302; State *v.* Gorham, 110 Wash. 330.

[10] United States *v.* Knight, 14 Pet. 301, 315; United States *v.* Herron, 20 Wall. 251, 263; Black on Interpretation of Laws (2d Ed.) 97.

SUPREME COURT OF THE UNITED STATES.

No. 190.—October Term, 1937.

Frank Carmine Nardone, Austin L. Callahan, Hugh Brown and Robert Gottfried, Petitioners,
vs.
The United States of America.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[December 20, 1937.]

Mr. Justice Sutherland, dissenting.

I think the word "person" used in this statute does not include an officer of the federal government, actually engaged in the detection of crime and the enforcement of the criminal statutes of the United States, who has good reason to believe that a telephone is being, or is about to be, used as an aid to the commission or concealment of a crime. The decision just made will necessarily have the effect of enabling the most depraved criminals to further their criminal plans over the telephone, in the secure knowledge that even if these plans involve kidnapping and murder, their telephone conversations can never be intercepted by officers of the law and revealed in court. If Congress thus intended to tie the hands of the government in its effort to protect the people against lawlessness of the most serious character, it would have said so in a more definite way than by the use of the ambiguous word "person". *Commonwealth* v. *Welosky*, 276 Mass. 398, 403-404, 406. For that word has sometimes been construed to include the government and its officials, and sometimes not. I am not aware of any case where it has been given that inclusive effect in a situation such as we have here. Obviously, the situation dealt with in *United States* v. *Arizona*, 295 U. S. 174, was quite different. There, a federal statute forbade the construction of any bridge, etc., in any port, etc., "until the consent of Congress shall have been obtained." The mere building of the designated structure, in the absence of congressional consent, violated the statute. There was no ambiguous term, such as we have here, or anything else in the language, requiring construction.

There is a manifest difference between the case of a private individual who intercepts a message from motives of curiosity or to further personal ends, and that of a responsible official engaged in the governmental duty of uncovering crime and bringing criminals to justice. It is fair to conclude that the word "person" as here used was intended to include the former but not the latter. This accords with the well-settled general rule stated by Justice Story in *United States* v. *Hoar*, 2 Mason 311, 314-315, 26 Fed. Cas. 329, 330: "In general, acts of the legislature are meant to regulate and direct the acts and rights of citizens; and in most cases the reasoning applicable to them applies with very different, and often contrary force to the government itself. It appears to me, therefore, to be a safe rule founded in the principles of the common law, that the general words of a statute ought not to include the government, or affect its rights, unless that construction be clear and indisputable upon the text of the act." And see *In the Matter of Will of Fox*, 52 N. Y. 530, 535. Compare *State* v. *Gorham*, 110 Wash. 330; *Balthasar* v. *Pacific Elec. Ry. Co.*, 187 Cal. 302, 305-308. A case in point is that of *People* v. *Hebberd* (Sup. Ct. N. Y.), 96 Misc. 617, 620-621.

In the investigations of the congressional committees, referred to in the opinion of the court, it appeared that the Attorney General had ordered that no tapping of wires should be permitted without the personal direction of the chief of the bureau, after consultation with the Assistant Attorney General in charge of the case; and that such means were to be adopted only as an emergency method. The Attorney General himself appeared before one of the committees and pointed out that crime had become highly organized, with strong political connections and illegal methods of procedure; that gangsters and desperate criminals had equipped themselves with every modern convenience and invention; that modern gangsters have no regard for life, property, decency or anything else; and he had no doubt that they tapped wires leading to offices of the United States attorneys to find out what was being done. He cited the case of a Bureau of Investigation agent who had been found shot to death under circumstances which indicated that a gang of narcotic traffickers had murdered him; and he posed the question whether, if it had appeared that the perpetrators of the crime could be detected and brought to justice by tapping their telephone wires, nevertheless, that ought not to be done.

The answer of Congress to the question has been a refusal to pass any of the bills which comprehensively proposed to forbid the practice.

My abhorrence of the odious practices of the town gossip, the peeping Tom, and the private eavesdropper is quite as strong as that of any of my brethren. But to put the sworn officers of the law, engaged in the detection and apprehension of organized gangs of criminals, in the same category, is to lose all sense of proportion. In view of the safeguards against abuse of power furnished by the order of the Attorney General, and in the light of the deadly conflict constantly being waged between the forces of law and order and the desperate criminals who infest the land, we well may pause to consider whether the application of the rule which forbids an invasion of the privacy of telephone communications is not being carried in the present case to a point where the necessity of public protection against crime is being submerged by an overflow of sentimentality.

I think the judgment below should be affirmed.

Mr. Justice McReynolds joins in this opinion.